

OPINION NO. 92-3 **LICENSES; FOREIGN CORPORATIONS; MORTGAGE COMPANIES**: A firm that, from an office in Nevada, solicits advance fees exclusively from persons outside the state for the purpose of making or arranging mortgage loans must be licensed as a mortgage company pursuant to NRS chapter 645B prior to engaging in that activity. A person who, from a location outside the state, solicits advance fees or mortgage loan business from Nevada residents through the use of local advertising media, direct mail or telephone, must be licensed pursuant to NRS chapter 645B prior to engaging in that activity. Foreign corporations engaging in the continuous and active solicitation of business in this manner are not exempt from licensing and regulatory requirements by NRS 80.015 and must, therefore, become licensed pursuant to NRS chapter 645B prior to engaging in that activity.

Carson City, March 12, 1992

Mr. L. Scott Walshaw, Commissioner, Financial Institutions Division, Department of Commerce, 406 East 2nd Street, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Walshaw:

The Financial Institutions Division has recently received several inquiries regarding firms that solicit fees in advance for the purpose of making or arranging mortgage loans. In some cases the solicitation is made from an office within this state exclusively to persons who reside outside the state. Although no Nevada residents are solicited, advance fees are sent into the state where they are deposited in the solicitor's local bank account. In other cases, firms with no office in Nevada solicit advance fees or loan business from Nevada residents by the use of local advertising media, direct mail or by telephone. You have advised us that the solicitation is regular, continuous, and constitutes a substantial part of the solicitor's business.

You have asked the following questions regarding the necessity for such firms to become licensed pursuant to NRS chapter 645B, governing mortgage companies. Since NRS chapter 645B governs the making or arranging of loans secured by a lien on real property, we shall assume such liens exist in the transactions you have described. We shall also assume that, except as noted, no statutory exemptions from the licensing requirement are applicable.

QUESTION ONE

Is a firm that, from an office within this state, solicits persons residing outside the state to send advance fees or otherwise enter into mortgage loan transactions required to obtain a license pursuant to the provisions of NRS chapter 645B prior to engaging in that activity?

ANALYSIS TO QUESTION ONE

It is unlawful to engage in the business of a mortgage company without a license issued by the Commissioner of Financial Institutions. See NRS 645B.210. A "mortgage company" means any person who, directly or indirectly,

- (a) Holds himself out for hire to serve as an agent for any person in an attempt to obtain a loan which will be secured by a lien on real property;
- (b) Holds himself out for hire to serve as an agent for any person who has money to lend, if the loan is or will be secured by a lien on real property;
- (c) Holds himself out as being able to make loans secured by liens on real property, unless the loans are made pursuant to subsection 8 or 10 of NRS 645.015;
- (d) Holds himself out as being able to buy or sell notes secured by liens on real property; or
- (e) Offers for sale in this state any security which is exempt from registration under state or federal law and purports to make investments in promissory notes secured by liens on real property.

NRS 645B.010(3).

There is nothing in the statutory definition of mortgage company which limits the jurisdictional reach of NRS chapter 645B to the protection of persons who reside in this state, and such a limitation on the state's police power is not constitutionally required. *Brown v. Market Dev., Inc.*, 322 N.E.2d 367 (Ohio 1974). In any event, NRS chapter 645B is also intended to protect those persons who provide money to lend, some of whom may be Nevada residents in the situation you have described. See, e.g., NRS 645B.175 and 645B.185. A firm that solicits advance fees from an office in this state for the purpose of making or arranging loans secured by a lien on real property is engaged, in our opinion, in the business of a mortgage company in this state and must, therefore, become licensed pursuant to NRS chapter 645B prior to engaging in that activity.

CONCLUSION TO QUESTION ONE

A firm that, from an office in Nevada, solicits advance fees exclusively from persons outside the state for the purpose of making or arranging loans secured by a lien on real property is engaged in the business of a mortgage company in this state and must obtain a license pursuant to the provisions of NRS chapter 645B prior to engaging in that activity.

QUESTION TWO

Is a firm that, from an office outside the state, solicits Nevada residents by the use of local advertising media, direct mail or telephone to send advance fees or otherwise enter into mortgage loan transactions required to obtain a license pursuant to the provisions of NRS chapter 645B prior to engaging in that activity?

ANALYSIS TO QUESTION TWO

One who holds himself out for hire as being able to make or arrange loans secured by a lien on real property is engaged in the business of a mortgage company as defined by NRS 645B.010(3). We believe that a person who uses local advertising media, direct mail or telephone to solicit advance fees or loan business from Nevada residents is holding himself out

as a mortgage company in this state. A natural person, partnership, domestic corporation and any other business organization except a foreign corporation must, therefore, become licensed pursuant to the provisions of NRS chapter 645B prior to engaging in that activity. Whether a foreign corporation engaged in this activity must be licensed requires a discussion of statutory provisions applicable to such corporation.

NRS chapter 80 contains provisions governing the qualification of foreign corporations doing business in this state. Act of June 25, 1991, ch. 442, § 133, p. 1244, amends NRS 80.015 to read, in part, as follows:

1. For the purposes of this chapter, the following activities do not constitute doing business in this state:

.....

(g) Creating or acquiring indebtedness, mortgages and security interests in real or personal property;

(h) Securing or collecting debts or enforcing mortgages and security interests in property securing the debts;

.....

(i) Transacting business in interstate commerce.

2. The list of activities in subsection 1 is not exhaustive.

3. A person who is not doing business in this state within the meaning of this section *need not qualify or comply with any provision of NRS 80.010 to 80.230, inclusive, chapter 645B of NRS or Titles 55 and 56 of NRS* unless he:

(a) Maintains an office in this state for the transaction of business;

or (b) Solicits or accepts deposits in the state, except pursuant to NRS 666.225 to 666.375, inclusive. [Emphasis added.]

In addition to creating an exemption from the qualification provisions of NRS chapter 80, subsection (3) of this statute also exempts certain foreign corporations from the licensing and regulatory provisions of NRS chapter 645B. *See* Op. Nev. Att'y Gen. No. 50 (April 26, 1955).

The exemption does not apply to foreign corporations that solicit or accept deposits in this state. NRS 80.016 contains detailed provisions which determine when a deposit is solicited or accepted in this state. The term "deposit," however, is not specifically defined. To determine whether an advance fee for a mortgage loan is a deposit within the meaning of NRS 80.015(3)(b), we must attempt to ascertain the intent of the legislature in enacting this provision. *Roberts v. State, Univ. of Nev. Sys.*, 104 Nev. 33, 38, 752 P.2d 221 (1988). We also note that, as an exception to the general rule requiring qualification under NRS chapter 80 and licensing under NRS chapter 645B, the exemption should be strictly construed. *See* Op. Nev. Att'y Gen. No. 123 (March 30, 1964) (opinion interpreting former similar statute).

By limiting the exemption from qualification and licensing requirements in NRS 80.015 to those foreign corporations that do not solicit or accept deposits in this state, we believe the legislature intended to further one of the primary purposes of laws governing the licensing and regulation of financial institutions--the protection of Nevada citizens from financial loss. That purpose is best served by construing the term "deposit" in NRS 80.015(3)(b) broadly to encompass any situation where a foreign corporation solicits money from Nevada residents in

the manner described in NRS 80.016. We, therefore, conclude that the advance fees described in your question are deposits within the meaning of NRS 80.015(3)(b). A direct mail or telephone solicitation is made in this state when "[i]t is directed by the solicitor to a destination in this state and received where it is directed or at a post office in this state if the solicitation is mailed." With respect to "local" advertising media, we would direct you to the provisions of NRS 80.016(3) and (4) to determine whether, in a particular case, the solicitation is made in this state. Since your question also involves the solicitation of mortgage business in general, we must still determine the applicability of the exemption created by NRS 80.015(3) to foreign corporations engaging in this activity.

We must attempt to reconcile NRS 80.015 with NRS 645B.220, which provides in full:

It is unlawful for any foreign corporation, association or business trust to transact any mortgage business unless it:

1. Qualifies under chapter 80 of NRS; and
2. Complies with the provisions of this chapter unless exempted by NRS 645B.015.

By requiring foreign corporations doing a mortgage business to qualify under NRS chapter 80 and become licensed under NRS chapter 645B, this statute appears, on the surface, to conflict with NRS 80.015(3) which exempts foreign corporations from qualification and licensing requirements. This conflict is especially apparent in relation to subsection (2) of NRS 80.015, which provides that the list of activities that exempt foreign corporations under subsection (1) is not exhaustive.

The activities described in NRS 80.015(1) were largely adopted from the Model Business Corporations Act ("Model Act"). Minutes of the Nevada State Legislature, Joint Senate and Assembly Committees on Judiciary, May 7, 1991, Exhibit C, Prepared Testimony of John Fowler in Support of A.B. 655, the Corporate Law Bill, pp. 11-12; Exhibit C-1, Study of Nevada Corporate Law by Vargas and Bartlett, July 30, 1990, p. 1-C.

Neither NRS chapter 80 nor the Model Act attempt to formulate an inclusive definition of what constitutes doing business in a state. Official Comments, Model Business Corporation Act, § 15.01, p. 1570. In the absence of a "safe harbor" provision such as NRS 80.015, the determination of whether activities constitute doing business depends not on a single factor but on the nature and extent of a corporation's activities in the state. *S.A.S. Personnel Consultants, Inc. v. Pat-Pan, Inc.*, 407 A.2d 1139, 1141 (Md. 1979). The Nevada Supreme Court has stated that "casual or occasional transactions" in the state will not constitute doing business, but a corporation doing a substantial part of its ordinary business in a continuous manner will require qualification under NRS 80.010. *In re Hilton Hotel*, 101 Nev. 489, 492, 706 P.2d 137 (1985). We believe that, by providing that the list of activities described in subsection (1) is not exhaustive, subsection (2) of NRS 80.015 is merely a recognition that some limited activity will not constitute "doing business in this state" under the general qualification statute, NRS 80.010.

We must also determine the applicability to your question of NRS 80.015(1)(l), which exempts from qualification and licensing requirements any foreign corporations "[t]ransacting business in interstate commerce." A literal application of this provision could exempt every

foreign corporation conducting business in more than one state and largely defeat the purpose of the qualification and licensing statutes. To avoid this absurd result, we believe this provision must be given a narrow construction.

Since the interstate commerce exemption is derived from the Model Act, it is appropriate to consider the construction placed on this exemption by courts of other states which have adopted this part of the Model Act. *See Ybarra v. State*, 97 Nev. 247, 249, 628 P.2d 297 (1981). In *DeKalb Cablevision Corp. v. Press Ass'n, Inc.*, 232 S.E.2d 353 (Ga. 1977), the court stated that the purpose of the interstate commerce exemption was to effectuate the principle that, under the Commerce Clause of the U.S. Constitution, a state may not interfere with a foreign corporation's right to engage in interstate commerce. The question of what is interstate commerce and the extent to which it may be regulated by the states is a federal one. 15A Am. Jur. 2d, *Commerce* § 6, p. 326. In *Contel Credit Corp. v. Tiger, Inc.*, 520 N.E.2d 1385 (Ohio 1987), a loan of money by a foreign corporation engaged in that business to an instate corporation was held to not fall within the realm of interstate commerce. Consistent with these decisions, we conclude that NRS 80.015(1)(l) should be interpreted as exempting only those activities which, under applicable federal law or judicial precedents, may not be regulated by the states without impermissibly burdening interstate commerce. We are aware of no decision holding that a state may not license and regulate persons soliciting loan business within its borders. NRS 80.015(1)(l) does not, therefore, exempt foreign corporations soliciting loan business in this state from the licensing and regulatory requirements of NRS chapter 645B.

The question remains whether the solicitation of loan business in this state by the use of local advertising, direct mail or telephone does not constitute doing business under the general qualification statute, NRS 80.010, or because it comes within one of the activities described in NRS 80.015(1). You have advised us that the solicitation takes place in a regular and continuous manner and constitutes a substantial part of the solicitor's ordinary business. This activity would, in our opinion, constitute doing business in this state under NRS 80.010. To determine whether this type of solicitation comes within one of the activities described in NRS 80.015(1), we must consider the interplay of this statute with NRS 645B.220.

The two statutes must, if reasonably possible, be harmoniously construed. *Sheriff, Clark County v. Luqman*, 101 Nev. 149, 154, 697 P.2d 107 (1985). As previously noted, the exemption should be strictly construed. *See Op. Nev. Att'y Gen. No. 123* (March 30, 1964). Since NRS 645B.220 is a special statute concerned with mortgage activity by foreign corporations, it must control in the event of a conflict with NRS 80.015, a general statute concerned with a broader range of issues. *Laird v. Nevada Pub. Employees Retirement Bd.*, 98 Nev. 42, 45, 639 P.2d 1171 (1982).

Had the legislature intended to exempt from licensing all mortgage business by foreign corporations who do not maintain an office or solicit deposits in this state, it would have been unnecessary to specifically provide in NRS 645B.220 that mortgage activity by foreign corporations requires licensure and qualification. The legislature has instead provided, in NRS 80.015(3), that such a foreign corporation must not be doing business in this state within the meaning of subsection (1) in order to qualify for the exemption.

Since the proper construction of these statutes is not apparent on their face, it is appropriate to consider legislative history as an aid to determining legislative intent. *Balioitis v. Clark County*, 02 Nev. 568, 570, 729 P.2d 1338 (1986). The substance of the mortgage company exemption now contained in NRS 80.015(3) was first introduced in legislation enacted in 1989. Act of June 6, 1989, ch. 296, Nev. Stat. 1989, § 1, p. 623. One of the sponsors of the legislation stated that its intent "was to provide a simplified system for an out-of-state lender to be able to qualify through the Secretary of State's office, to make a few loans and 'exit' the state without having to go through licensing or other extensive and sophisticated forms of qualification." Minutes of the Nevada State Legislature, Assembly Committee on Judiciary, May 19, 1989 (Testimony on Assembly Bill 768). The legislation would "primarily apply to charter financial institutions and insurance companies who were doing business somewhere else in the United States or in a foreign country, but were not here to establish a permanent presence." *Id.* "[I]f a person was actively engaged in the business of 'lending,' he would have to apply to the Department of Commerce for a license because the state had an interest in regulating people in the business of lending; but did not have an interest in regulating people who made one or two isolated loans." *Id.* The official Comments to Section 15.01(b) of the Model Act, from which NRS 80.015(1)(g) and (h) were derived, states that "[i]n general terms, any conduct more regular, systematic or extensive than that described in section 15.01(b) constitutes the transaction of business and requires the corporation to obtain a certificate of authority." Model Business Corporation Act Annotated, Vol. 4, p. 1570.

Consistent with this legislative history, we conclude that NRS 80.015(3) exempts from the licensing and regulatory requirements of NRS chapter 645B and Titles 55 and 56 of NRS, only those foreign corporations whose contacts with the State of Nevada are limited to the activities specifically described in subsection (1) of this statute or are otherwise so limited as to not constitute doing business under NRS 80.010. Such a construction is required, in our opinion, in order to give substantive effect to NRS 645B.220.

Although foreign corporations may, pursuant to NRS 80.015(1)(g) and (h), enter into loan transactions and secure and collect such debts, the list of permissible business activities does not include the regular and continuous solicitation of loan and mortgage business in this state by the use of local advertising media, direct mail or telephone. A foreign corporation engaged in such active solicitation of business in this state is clearly holding itself out as a mortgage company and has exceeded, in our opinion, the limited range of activity exempt from the licensing requirement pursuant to NRS 80.015(3). Such a corporation must, therefore, obtain a license pursuant to NRS chapter 645B prior to engaging in that activity.

CONCLUSION TO QUESTION TWO

A natural person, partnership, domestic corporation and any other business organization except a foreign corporation that, from a location outside this state, solicits advance fees or loan business from Nevada residents through the use of local advertising media, direct mail and telephone, must become licensed pursuant to NRS chapter 645B if the loan will be secured by a lien on real property. Foreign corporations engaging in the continuous and active solicitation of business in Nevada in this manner are not exempt from licensing and regulatory requirements by

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NRS 80.015 and must, therefore, become licensed pursuant to NRS chapter 645B prior to engaging in that activity.

Sincerely,
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